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Policy Objectives for Federal Land Management

POLICY OBJECTIVES FOR FEDERAL LAND MANAGEMENT

*The State of Utah's Policy Objectives to
Achieve Balanced Management of Federal Lands*

November 30, 2016

The Public Lands Policy Coordinating Office ("PLPCO") of the Governor of the State of Utah (the "State") presents the following policy objectives relating to management of the public land within the State's boundaries. This list identifies the priorities of the highest importance, although numerous other policies concerns exist. Each issue identified below is only a brief outline of the issue and the solutions being sought. Upon request, PLPCO will provide additional details regarding the specific actions needed to address each of these policy priorities and assist in preparing language or other work product for proposed solutions.

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Policy Objectives for Federal Land Management

2017 STATE PRIORITIES

A. Preserve State Sovereign Interests on Public Lands

1. **Increase State and Local Government Decision Making in Federal Process.** Strengthen cooperating agency status and mandate federal consultation regarding federal management decisions and planning documents.
2. **Maintain Access to Public Lands and Natural Resources.** Protect access to public lands by resolving the state's R.S. 2477 road litigation and revoking federal actions and plans that prohibit or limit access to public land.
3. **Wildlife Management.** Protect and restore state authority over wildlife by reducing federal oversight over state managed wildlife and encouraging federal regulations issued under the endangered species act that recover and delist species while supporting state management over wildlife.

B. Encourage Sound Land Management Policies

1. **Wilderness Reform.** Preclude federal agencies from managing areas that are not wilderness study areas or Congressionally designated wilderness, such as "lands with wilderness characteristics," as *de facto* wilderness and request Congressional action and determination on all wilderness study areas.
2. **Management of Wild Horses and Burro Populations.** Encourage BLM to manage wild horse populations and use all available tools and techniques to manage wild horses and burros under the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. § 1331 *et seq.*
3. **Maintain and increase public land grazing.** Maintain and increase the current number of AUM's available for livestock grazing, and, where appropriate, allow adaptive management strategies to more fully benefit from range resources.
4. **Encourage Conservation.** Amend land use plans, policies and practices that encourage only preservation, but do not allow for multiple-use and conservation of resources.

C. Limit Large Scale Land Reservations and Withdrawals

1. **Support Resource Conservation and Development.** Diminish Secretary of Interior's broad discretion over mineral, oil, and gas reservations, deferrals, and moratoriums
2. **Revoke Harmful Secretarial Orders.** Revoke [REDACTED] policies reserving or limiting access and use of large portions federal land in Utah and prevent similar orders from being issued.
3. **Sage-grouse Land Use Plan Reform.** Amend or revoke sage-grouse land use plans limiting energy resource by withdrawing millions of acres of land in Utah under the guise of protecting sage grouse habitat.
4. **Antiquities Act Reform.** Limit Presidential authority exercised under the Antiquities Act, 54 U.S.C. § 320301 and modify past designation of monuments in Utah.

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Policy Objectives for Federal Land Management

D. Equal Access to Justice Act (EAJA) and Rulemaking by Judicial Proceedings (“Sue and Settle”)

1. **EAJA Restructuring.** Work with state and federal representative to reform EAJA to limit the act’s applicability, require public disclosure and participation, account for payments made, and require transparency.
2. **Challenge Sue and Settle Litigation.** Limit sue and settle activities by environmental organizations and the resultant rulemaking occurring outside of the Administrative Procedures Act.
3. **Education and Improvement.** Educate local governments, lawmakers, lawyers and judges, and others regarding the impact of environmental litigation and attorney fee awards under EAJA.

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Policy Objectives for Federal Land Management

EXECUTIVE SUMMARY OF POLICY PRIORITIES

A. Preserve State Sovereign Interests

The State, as a sovereign entity, has a duty and the authority to protect the health, welfare and safety of the citizens within its border. The State opposes congressional, judicial, and executive abrogation of the State's duty to protect its citizens. Further, citizens of the State are opposed to unreasonable and intrusive federal mandates and oversight. The right to use, access, and enjoy the natural resources found within the State is one that has existed for over a century. Several federal actions and policies have encroached upon the State's rights, diminished the State's position as a cooperating agency, and disregarded the State's policies and input regarding management of federal land within the State. These actions have also resulted in restrictions on access to public land within the State and usurpation of the State's right to manage un-endangered and unlisted wildlife.

- 1. Cooperating Agency Status and Consultation Regarding Federal Management Decisions.** Although many statutes afford the State the right to be consulted and to have its input meaningfully considered by federal land agencies, in practice the State's and local governments' participation in the planning process for land use is diluted and disregarded. The status of special interest groups, on the other hand, has been elevated and is, in practice, often given weight equal to or excess of that accorded to the State and local governments. Planning rules, handbooks, and policies have diminished the role played by cooperating agencies, including the State, in land management decisions and have led to an emphasis on land preservation instead of multiple-use. Coordinating policies and land use decisions with State and local governments will protect the State's citizens' access to, and use of, public land within the State.

Issue: Federal agencies have interpreted statutes requiring coordination and consideration of State and local government policies to require only consultation, with no obligation to cooperate, substantively consider comments offered by the State or local governments, or achieve consistency with State and local government policies.

Solutions:

Congressional: Amend Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA"), National Forest Management Act, 16 U.S.C. § 1600 *et seq.* ("NFMA"), and National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") to place the burden of coordination on the federal land agencies to ensure that the State is given a chance to participate in federal land use planning processes and require coordination throughout the planning and implementation process. Strengthen cooperating agency status in FLPMA, NFMA, and NEPA to require that inconsistencies raised by the State's Governor during the consistency review process be addressed and to require that State and local land use and

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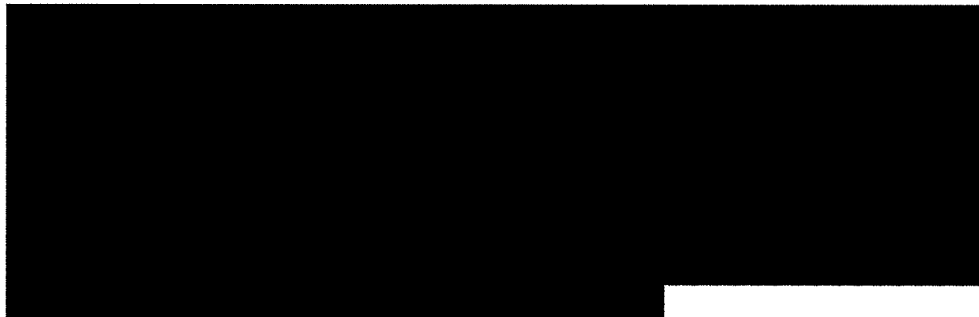
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Policy Objectives for Federal Land Management

resource plans and policies be accounted for and implemented in land use plan amendments.

Administrative: Revise handbooks, policies, and directives to implement FLPMA, NFMA, and NEPA in a way that provides the State and local governments the ability to provide input as cooperating agencies and independent sovereigns as originally envisioned by the statutes. Amend handbooks, policies, and directives to require early coordination with the State and local governments in all land use planning decisions. Revise handbooks, policies, and directives to require consideration and implementation of State and local government land use plans, policies, and programs to the extent they are not inconsistent with federal statutes.

Amend handbooks, policies, and directives to require federal agencies to obtain and meaningfully consider input from the State and local governments, to adopt land use management plans consistent with State and local government plans, programs, and policies, and to explain the reasons for not adopting the State's and local governments' plans, programs, and policies. Amend handbooks, policies, and directives to require meaningful consideration of the impact of land management decisions on local and State economies, access to resources, and development opportunities. Amend handbooks, policies, and directives to strengthen the consistency review process.



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Policy Objectives for Federal Land Management



6.2. Access to Public Land and Natural Resources. BLM and the Forest Service have limited access to, and use of, public land within the State. The State has management jurisdiction over water and un-endangered and unlisted wildlife within the State, much of which is located on federal land. The State is dependent upon access to its natural resources and federal land within its boundaries to exercise its management authority, to promote economic development, and to ensure the enjoyment, health, and welfare of the State's citizens.

Issue: The State has been unable to resolve its claims under R.S. 2477 for rights-of-way established across federal land prior to 1976. These rights of way are essential for access to federal land, resource development, and enjoyment of federal land by the State's citizens, and visitors to the State.

Solutions:

Congressional: Enact a statute providing a streamlined process for resolving the State's R.S. 2477 claims, addressing who bears the burden of proof and defining the burden, addressing standards for accepting an R.S. 2477 grant, and granting a right-of-way through Recapture Canyon. Amend the Quiet Title Act, 28 U.S.C. § 2409a, to expressly preempt state statutes of limitation and to define "disputed title" to be consistent with a "cloud on title" standard.

Issue: The means of accessing federal land have been restricted, including access by OHVs and motorized and mechanized modes of transportation.

Solutions:

Congressional: Amend relevant statutes to provide specific standards regarding when rights-of-way will be open to OHV, mechanized, and motorized use.

Administrative: Amend regulations prohibiting or limiting OHV, mechanized, and motorized use in various areas. Amend regulations to allow OHV use on roads open to vehicular traffic.

Executive: Revoke or modify Executive Order No. 11644, Use of Off-Road Vehicles on the Public Lands (Feb. 8, 1972) and Executive Order No. 11989, Off-Road Vehicles on Public Lands (May 24, 1977) to accord more freedom to the land managing agencies to allow OHV access to federal land.

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Policy Objectives for Federal Land Management

Issue: Pursuant to the “Cotter decision,” the State is assured in its ability to access State School and Institutional Trust Land parcels for purposes that directly or indirectly generate economic revenues for the school trust fund. Revenue producing activities on trust lands are, as a practical matter, limited by restrictive designations or reservations of surrounding lands as national parks, national monuments, wilderness study areas, wilderness, or lands with wilderness characteristics.

Solutions:

Congressional: Amend FLPMA, NFMA, and other authorities to require access to State trust parcels for any purpose identified by the State, regardless of whether it is access for a situation “directly involving economic revenues generated for the school trust.” Amend relevant statutes to allow access to inheld properties regardless of the designations applicable to surrounding land.

Administrative: Revise rules, handbooks, policies, and directives to provide for access to trust parcels for any purpose identified by the State and regardless of restrictive designations applicable to surrounding parcels.

7.3. Wildlife Management. Management of species that are not endangered or listed under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”) is committed to the State by the Tenth Amendment. Recently, federal agencies have usurped the role of the State for managing wildlife within its borders by dictating management strategies for species that are not listed under the ESA. Wildlife management in wilderness areas has been curtailed by federal agencies' requests for the State to obtain permits from the federal agencies before engaging in mechanized and motorized wildlife management activities in certain areas.

Issue: The federal government is attempting to engage in wildlife management activities within the State's boundaries without statutory authority and is expanding the limited statutory authority the federal government has to regulate endangered species. The federal government has requested permits and otherwise exercised authority over management activities in a way that interferes with and limits the State's ability to manage wildlife populations.

Solutions:

Congressional: Amend relevant statutes to affirm the State's right to manage wildlife and to clearly delineate the limited circumstances under which the federal government may regulate wildlife, namely when the wildlife has been federally listed as an endangered species under ESA. Amend relevant statutes to expressly affirm the State's right to actively manage wildlife on all land, including Wilderness Areas, WSAs, and land with wilderness characteristics, and to eliminate the need for the State to

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Policy Objectives for Federal Land Management

obtain permits from the federal government before engaging in wildlife management activities.

Administrative: Amend handbooks, policies, and directives requiring permits or consent from the federal government before the State may engage in management activities, such as using helicopters in wilderness areas. Revise planning rules to affirm the State's position as the sovereign entity with responsibility for managing wildlife, including preparing all plans for managing unendangered and unlisted wildlife populations on federal land and to strengthen the State's position as a coordinating agency with exclusive authority for wildlife management activities. Amend regulations, policies, handbooks, and directives to specifically allow the State to use mechanized and motorized means to manage wildlife, even in Wilderness Areas, WSAs, and land with wilderness characteristics, and to eliminate the need for the State to obtain permits from the federal government before engaging in management activities.

Issue: Although the State's plan has been successful in recovering sage-grouse populations, the federal government has not agreed to adopt the plan because it relies upon voluntary conservation measures. Despite the fact that the species is not federally listed as endangered under ESA, the federal government has imposed a *de facto* listing by dictating to the State the manner and means by which the sage-grouse populations are managed.

Solutions:

Administrative: Allow State to perform its role of wildlife management to prevent a species from becoming listed under the Endangered Species Act. Amend regulations, handbooks, policies, and directives to recognize the State's authority to manage sage grouse populations for unlisted birds and implement the State's sage grouse conservation plan.

Issue: The ESA is used to curb development rather than to protect endangered species. Large areas that are designated as critical habitat are unnecessary for the recovery of listed species and are instead chosen to restrict development of natural resources.

Solutions:

Congressional: Set statutory standards so that the regulations, policies, and directives adopted do not exceed the purpose or intent of the ESA as originally written.

Administrative: Adopt criteria that allows for a flexible management approach that encourages economic development while preserving endangered species. Amend rules, handbooks, policies, and directives to

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Policy Objectives for Federal Land Management

protect the species, but not necessarily each individual within the species. Achieve a balance between habitat designation and development of natural resources.

B. Encourage Sound Land Management Policies

Federal land management has created significant difficulties for the State and its local economies. The federal government has failed to resolve WSA designations and has removed large areas of land from multiple-use mandates outside of any statutory authority to do so by creating *de facto* wilderness. Land management practices have led to the degradation of many range resources by failing to properly manage wild horse and burro populations on the western ranges or provide for adaptive management of grazing allotments.

1. **Wilderness, Wilderness Study Areas, and *de facto* Wilderness.** Addressing the multiple-use of land that has not been designated as wilderness is a high priority for the State. Federal land management policies and practices have created large areas denominated “lands with wilderness characteristics” that are managed for preservation purposes despite being subject to the FLPMA multiple-use mandate. In addition, although wilderness inventories conducted pursuant to FLPMA were completed in the 1990s, Congress has not made a final determination regarding the disposition of WSA land.

Issue: Agency practices and policies have resulted in land being managed as wilderness despite not being Congressionally approved Wilderness Area or timely identified as a WSA. Agencies are inventorying lands as potential wilderness and are managing lands as wilderness if they are determined to have “wilderness characteristics.” Managing undesignated land as Wilderness Areas or as WSAs has resulted in land that should be subject-managed for multiple-use being subjected to a preservation mandate not envisioned by statutory authority.

Solutions:

Congressional: Amend FLPMA and the NFMA to preclude agencies from managing land that is not designated as Wilderness Areas or WSAs instead of managing the land for multiple-use. Require Congressional action on all pending WSA designations.

Administrative: Amend policies, handbooks, procedures, and directives to preclude agencies from managing land for preservation or managing the land as wilderness if the land is not designated as a WSA or Wilderness Area. Amend policies, handbooks, procedures, and directives to preclude agencies from conducting additional inventories of land for wilderness and wilderness characteristics. Amend the Forest Service’s 2012 Planning Rule, pursuant to which the Forest Service is conducting an inventory of land to recommend for designation as wilderness. Revoke the Forest

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Policy Objectives for Federal Land Management

Service's roadless rule and reinstate timber production on federal land that has been managed as special areas or roadless areas.

Executive: Although the order is unfunded, revoke Secretarial Order No. 3310, *Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management* (Dec. 22, 2010).

2. **Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. § 1331 *et seq.* ("WHBA").** The BLM has management authority and duties under the WHBA, but has failed to manage the horses in a way to control their populations as required by the WHBA. Populations of wild horses are nearly three times the appropriate management levels ("AML") set by the BLM. These excess horses have damaged rangeland resources and impacted grazing on the federal land and reduced forage for other wildlife

Issue: BLM has been unable to implement the WHBA as written because of Congressional riders prohibiting the BLM from using all available means of controlling wild horse populations on public land. BLM has refused to follow the recommendation of the Wild Horse and Burro Advisory Board to offer unadoptable animals for sale without limitation or humane euthanasia.

Solutions:

Congressional: Allow and fully fund the implementation of the WHBA as written by allowing the BLM to use sufficient funds to allow horses to be sold without limitation or humanely euthanized.

Administrative: Implement policies within the BLM to focus on gathering and removing excess wild horses. Implement policies to follow the recent recommendation from the advisory board. Allow the State to manage wild horse populations as delineated in the WHBA as written.

3. **Adaptive Range Management and Public Land Grazing.** Conditions on the range change depending upon many variables, including drought and forage conditions. Adaptive management allows federal agencies to respond to changing conditions in real time to more effectively manage the rangeland resources.

Issue: Animal Unit Months ("AUM") are at times voluntarily suspended because of range conditions. Environmental analyses are not conducted for suspending AUMs. To reinstate AUMs, however, agencies often require environmental analyses. In addition, agencies at times do not reinstate the voluntarily suspended AUMs and instead allow them to be removed from the permits by not notifying the permit holder that previously approved, but voluntarily suspended, AUMs that were initially part of the permit have been removed.

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Policy Objectives for Federal Land Management

Solutions:

Congressional: Create a categorical exclusion to NEPA for reinstating voluntarily suspended AUMs.

Administrative: Adopt a policy of including adaptive management language in all environmental assessments relating to permit administration and renewals. Adopt a policy requiring agencies to notify permit holders of available, but voluntarily suspended, AUMs so that the permit holder does not lose the opportunity to request the maximum number of AUMs under the permit.

C. Limit Large Scale Land Reservations and Withdrawals

Land and interests in land have been reserved on a large scale, and uses critical to local governments and residents have been curtailed, at times without any significant review of the economic or social impacts of the actions. Among the most pressing issues relating to large scale reservations are the unilateral use of the Antiquities Act to reserve and remove from multiple-use millions of acres of land necessary for local economies; withdrawal of land from mineral, oil, and gas development; withdrawals of land under the guise of recovering populations of sage grouse; and enacted and requested moratoriums on coal, oil, and gas production.

1. **Mineral, Oil, and Gas Reservations, Deferrals, and Moratoriums.** Several large scale oil, gas, and mineral withdrawals and deferrals have been made in recent years, largely to prevent coal, oil, and gas production from federal land. These withdrawals include, but are not limited to, (1) Secretarial Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15, 2016), which imposed a moratorium on processing of applications for coal leases and prohibited leases, lease sales, and modifications subject to limited exceptions; (2) Public Land Order 7787, Withdrawal of Public and National Forest System Lands in the Grand Canyon Watershed, Arizona (Jan. 21, 2012), which withdrew for twenty years approximately one million acres from location and entry; and (3) *Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of Intent to Prepare an Environmental Impact Statement*, 80 Fed. Reg. 57635 (Sep. 24, 2015), which proposes withdrawing approximately ten million acres of land from mineral entry for sage grouse habitat. In addition, several parcels that would otherwise be available for leasing have been deferred and withheld from sale.

Issue: Mineral, oil, and gas development has been halted on federal land by withdrawals, deferrals, and other procedures.

Solutions:

Congressional: Amend relevant authorities to require that parcels be made available for leasing and development if certain conditions are met,

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Policy Objectives for Federal Land Management

including economic and social analyses of the effect of the withdrawal, limitations on the purpose, temporal duration, and geographic extent of the withdrawal, and limitations on the nature of the lands that may be withdrawn.

Administrative: Amend relevant rules, handbooks, policies, and directives to provide that parcels “shall” be offered under certain circumstances, rather than stating that parcels “may” be offered for leasing and development. Prepare new policies and amend existing policies to encourage and allow mineral, oil, and gas development on federal land.

Executive: Revoke Secretarial Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize Federal Coal Program (Jan. 15, 2016).

Issue: Millions of acres of land have been proposed to be withdrawn to protect purported sage grouse habitat. Sage_grouse is not found in many of the areas subject to the withdrawal, and the State’s conservation plan for sage grouse populations addresses threats to the sage grouse’s habitat. The mineral withdrawal usurps the State’s authority to manage the sage grouse and precludes development in areas that are not sage grouse habitat.

Solutions:

Administrative: Amend regulations, handbooks, policies, and directives to recognize the State’s authority to manage sage_grouse populations for unlisted birds and adopt the State’s sage_grouse conservation plan. Revoke the notice of proposed withdrawal, limit the habitat to that in which the sage_grouse is actually found, and acknowledge the State’s role in wildlife management by allowing it to conserve the sage_grouse and its habitat as provided by the Tenth Amendment.

2. **Climate Change Programmatic EIS for Coal and Oil and Gas Moratorium.** Secretarial Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15, 2016) ordered a discretionary programmatic EIS to evaluate, among other things, how to assess federal coal production’s impact on climate, how to address any such impact, and “how best to protect the public lands from climate change impacts.” While this discretionary programmatic EIS is being performed, new coal leases have been prohibited, with limited exception. A recent lawsuit, *Wild Earth Guardians v. Jewell*, Case No. 1:16-cv-01724 in the United States District Court for the District of Columbia, requests a programmatic EIS to assess the impact on climate of oil and gas leasing and production from federal lands. If successful, this litigation could result in a moratorium of oil and gas leasing in addition to the coal leasing moratorium.

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Policy Objectives for Federal Land Management

Issue: Programmatic EISs are being used as a means of limiting hydrocarbon production on federal lands in response to the “keep it in the ground” movement. Areas are effectively withdrawn from leasing without any analysis of the economic or social impact such actions have on the communities depending upon energy production. In addition, as evidenced by the recently filed litigation, areas may be effectively withdrawn as the result of rulemaking by judicial proceedings (suing and settling).

Solutions:

Congressional: Amend relevant statutes to prohibit the Secretary of the Interior from halting hydrocarbon leasing activities on federal land during the pendency of programmatic EISs. Amend relevant statutes to require analyses of the social and economic effect of deferring leases or prohibiting new leases while a programmatic EIS is performed. Prepare statutory criteria governing any action that prohibits or limits, on a programmatic scale, leasing activities on federal land.

Administrative: Amend agency rules, handbooks, policies, and directives regarding leasing activities on federal land to identify criteria limiting the Secretary’s ability to defer leases or limit leasing activities on a programmatic scale.

Executive: Revoke Secretarial Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15, 2016).

- 3. Antiquities Act, 54 U.S.C. § 320301.** The Antiquities Act provides that “[t]he President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.” 54 U.S.C. § 320301(a). The act allows the President to “reserve parcels of land as part of the national monuments.” 54 U.S.C. § 320301(b). “The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. § 320301(b).

Issue: Although the Antiquities Act was originally intended and written to limit the geographic scale of reservations of land to the “smallest area compatible with the proper care and management of the objects to be protected,” it has been used to reserve and remove from multiple-use and development millions of acres of federal land across the western United States. Reservations have been made without input from or consent of the elected representatives serving the areas reserved and in the face of opposition from local governments and residents.

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Policy Objectives for Federal Land Management

Solutions:

Congressional: Amend the Antiquities Act to require input from and consent of the elected representatives serving the areas reserved; exempting the State from future Antiquities Act proclamations; subjecting national monument designations to review under NEPA; limiting the size or location of a national monument; or requiring Congressional approval of monument proclamations. Address or diminish the size of prior national monument reservations.

Executive: Diminish the size of national monuments previously made that reserved more land than the smallest area compatible with the proper care and management of the objects to be protected.

D. Equal Access to Justice Act and Rulemaking by Judicial Proceedings (“Sue and Settle”)

1. **EAJA Restructuring** The Equal Access to Justice Act, 28 U.S.C. § 2412 (“EAJA”) allows nonprofit entities to recover attorneys’ fees and expenses if they prevail in a civil action against the federal government. This act is used by many NGOs to recover fees and fund additional litigation involving the federal government.

Issue: Because NGOs can recover attorneys’ fees, they are not hesitant to pursue litigation against the federal government to further their special interests. Many federal agencies are sympathetic to the views advocated by these organizations and invite litigation so that the parties can settle the litigation and have their settlement agreement clothed with the authority of a court order and thereby accorded the deference of an administrative rule without rule-making procedures. These court orders are essentially rulemaking by judicial proceeding, involving only the special interest group and the federal government and precluding the opportunity for involvement by the public and, at times, the State and local governments, as required by statute.

Solutions:

Congressional: Limit the applicability of the act to specific entities. Require public disclosure of and participation in the development of settlement agreements entered into by the federal government and NGOs. Require disclosure of and accounting for payments made pursuant to EAJA. Require transparency in the litigation, settlement, and award processes.

Administrative: Adopt rules, policies, and directives requiring the publication of proposed settlements, requiring public comment on proposed settlements, and increasing transparency in the litigation, settlement, and award process.

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Policy Objectives for Federal Land Management

- 2. Challenge Sue and Settle Litigation.** Limit sue and settle activities by environmental organizations and the resultant rulemaking occurring outside of the Administrative Procedures Act.
- 3. Education and Improvement.** Educate local governments, lawmakers, lawyers and judges, and others regarding the impact of environmental litigation and attorney fee awards under EAJA.

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